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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

JOHN LAMBERT, SUPERINTENDENT,
WASHINGTON STATE PENITENTIARY,

Petitioner,

v.

BRIAN KEITH LORD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

The Ninth Circuit held an attorney's judgment on the selection of witnesses is entitled to "less deference" where the attorney relies on interviews conducted by an experienced defense investigator rather than personally interviewing the witnesses. In opposition to the petition, Lord argues this "less deference" standard is consistent with *Strickland v. Washington*, 466 U.S. 668 (1984) and the other circuit courts' application of *Strickland* because the amount of deference accorded to counsel's decision should be based on the amount of investigation personally conducted by counsel. Because Lord's brief points out the very conflict created by the Ninth Circuit's decision, the Court should grant the petition for a writ of certiorari.[1]

II. ARGUMENT

A. *Strickland* Did Not Establish a Sliding Scale of Deference for Reviewing Counsel's Decisions.

The Ninth Circuit stated it would have deferred to counsel's decision not to the call the three teenagers as witnesses if counsel had personally interviewed the youths. *Lord v. Wood*, 184 F.3d 1083, 1095 & n. 8 (9th Cir. 1999). Because counsel did not look the witnesses in the eye, however, the Ninth Circuit believed counsel's decision is entitled to less deference. *Id.*

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[1] Lord spends several pages alleging that the state withheld exculpatory evidence, that the state's scientific evidence was faulty, and that the informants testified about Lord's confession in exchange for undisclosed deals. The district court rejected each of these claims following an evidentiary hearing. *See* App. 48a-49 (finding undisclosed information was not material); App. 49a-51a (rejecting challenge to admissibility of state's scientific evidence); and App. 59a-61a and 73a-74a (rejecting claims regarding informants' testimony).

Lord defends the Ninth Circuit's decision by contending that "*Strickland* started from the premise that the more investigation a trial lawyer does before making a strategic choice, the more deference trial counsel's strategic choice deserves." Opposition to Petition for Writ of Certiorari, at 7. Lord argues "the less thorough the investigation, the less deference to strategic decisions of counsel is warranted." *Id.* at 9. However, *Strickland* did not establish a sliding scale of deference for reviewing counsel's decisions.

In reviewing a claim of ineffective assistance, the federal courts must always start with a strong presumption "that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. This presumption applies to decisions made following a complete investigation, to decisions made to limit an investigation, and even to decisions not to conduct a particular investigation. *Id.* Contrary to Lord's argument, this Court has never applied a "sliding scale of deference" in reviewing counsel's decisions.

Lord's assertion that the amount of deference applied depends upon the investigation conducted directly conflicts with *Strickland*'s declaration that all decisions of counsel, even decisions not to investigate, must receive a heavy measure of deference. As this Court stated:

> In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, ***applying a heavy measure of deference to counsel's judgment.***

Strickland, 466 U.S. at 690 (emphasis added).

In any ineffective assistance case, no matter the factual circumstances, the federal courts must begin their review by presuming counsel rendered adequate assistance. The federal courts must apply a heavy measure of deference to all of counsel's judgments, regardless of the amount of investigation actually conducted. *Strickland*, 466 U.S. at 690. By applying "less deference" to counsel's decision not to call the teenagers as witnesses, simply because counsel did not conduct a face-to-face meeting with the boys, the Ninth Circuit applied a standard in direct conflict with the standard established in *Strickland*.

Attempting to distinguish *Lewis v. Mazurkiewicz*, 915 F.2d 106 (3rd Cir. 1990), Lord characterizes the actions of his attorneys as a complete failure to investigate the three boys. However, counsel did in fact investigate the teenagers. After reviewing the police reports of the boys' statements and the interview reports prepared by the first defense investigator, counsel assigned an experienced investigator to contact and re-interview the boys. Lord's counsel made a conscious decision to have the investigator contact the boys rather than spending the valuable resources required for the attorneys to conduct a personal interview. The investigator talked with the boys and reported back to counsel. After conferring with the investigator, counsel decided not to call the boys as witnesses. Counsel did investigate the teenagers and the proposed testimony.

The only step allegedly lacking in the investigation was a personal, face-to-face meeting between the attorneys and the boys. This Court has never required that counsel conduct such meetings, however, and Lord fails to show how such a meeting would have altered counsel's decision making process in this case. The boys were not angelic witnesses who would have swayed counsel with charisma. As the evidentiary hearing revealed, there were sufficient deficiencies with the teenagers' proposed testimony that counsel could have reasonably decided

not to call the teenagers as witnesses.[2] Counsel decided that evidence of an alleged sighting of Tracy the day after she disappeared was not the type of evidence counsel wished to present at trial. App. 342a ("They all fell into the category of testimony that we, we decided we did not want to present."). A face-to-face meeting would not have altered this decision.

Attempting to distinguish *Lewis v. Lane*, 832 F.2d 1446, (7th Cir. 1987), *cert. denied*, 488 U.S. 829 (1988), Lord essentially argues an interview conducted by another attorney carries more weight than an interview conducted by an experienced defense investigator. Opposition to Petition for Writ of Certiorari, at 14-15. There is no evidence that attorneys are better judges of credibility than lay people. Consequently, the courts should grant the same amount of deference to counsel's judgment not to call a witness based upon a third party interview, whether the interview had been conducted by an experienced investigator or another attorney. If the courts apply less deference to counsel's decision simply because counsel did not personally look the witness "in the eye", this "less deference" standard must apply both where the witness is interviewed by another attorney (as in *Lewis v. Lane*) and where the witness is interviewed by an experienced defense investigator (as in *Lord*). Because *Lord* applies "less deference" where counsel does not personally interview a witness, but *Lewis* does not, *Lord* conflicts with *Lewis*.

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[2] Lord argues the district court merely speculated about what counsel "could have found". Opposition to Petition for Writ of Certiorari, at 25-26. The district court, however, never stated its ruling was the product of speculation. Rather, the district court clearly stated that "[h]aving carefully reviewed all of the documentary evidence submitted on this claim and having heard the testimony of the three witnesses as well as the opinion of Lord's expert witness, the court concludes that the decision not to call them was a reasonable strategic choice which did not amount to ineffective assistance of counsel." App. 88a.

Lord also attempts to distinguish *Walls v. Bowersox*, 151 F.3d 827 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 1468 (1999), by arguing the efforts to contact witnesses in *Walls* were made not just by subordinates "but also by the trial lawyers". Opposition to Petition for Writ of Certiorari, at 13. Lord again suggests that interviews by attorneys are somehow categorically superior to interviews conducted by experienced investigators. In making this argument, however, Lord ignores the Eighth Circuit's ruling that counsel acts properly by delegating investigative work to subordinates. *Id.* at 834 n. 4; *see also United States v. Weaver*, 882 F.2d 1128, 1138 (7th Cir.), *cert. denied*, 493 U.S. 968 (1989) (counsel may properly seek the aid of investigators for preparation and investigation). Lord's argument, and the Ninth Circuit's holding, that counsel's judgment is entitled to less deference, simply because an investigator rather than counsel interviewed the potential witnesses, directly conflicts with *Walls*.

Although Lord attempts to distinguish *Williams v. Head*, 185 F.3d 1223 (11th Cir. 1999), it is clear *Williams* concerned a claim of ineffectiveness based on the alleged failure to personally interview and call witnesses. Unlike the Ninth Circuit, the Eleventh Circuit held counsel's decisions to limit an investigation is accorded a strong presumption of reasonableness, and a decision not to investigate must be reviewed applying a heavy measure of deference. *Williams*, 185 F.3d at 1236-37.

Finally, Lord fails to show that *Strickland* is premised on a sliding scale of deference. In *Strickland*, defense counsel conducted a considerably less than thorough investigation. Counsel spoke to the defendant and to the defendant's wife and mother. *Strickland*, 466 U.S. at 672-73. Counsel did not follow up on the one unsuccessful effort to meet with the defendant's family, did not request a psychiatric examination, and did not look further for evidence concerning the defendant's character and emotional state. *Id.* at 673. The Court did not apply "less deference" to counsel's judgments even though counsel did not conduct a complete and thorough investigation.

Although Lord attempts to distinguish the cases cited by Petitioner, the fact remains that this Court and the other circuit courts have consistently applied a heavy measure of deference to all of counsel's decisions, including decisions based on a less than thorough investigation. Because it applies a "less deference" standard, the Ninth Circuit's holding conflicts with *Strickland* and the other circuit court cases applying *Strickland*.[3]

B. The Ninth Circuit Relieved Lord of His Burden of Proving Prejudice Under *Strickland*.

The Ninth Circuit found "the ***possibility*** that [the teenagers'] testimony would have led to Lord's acquittal to be 'sufficient to undermine confidence in the outcome.'" *Lord*, 184 F.3d at 1085-96 (emphasis added). Citing to *O'Neal v. McAninch*, 513 U.S. 432 (1995), the Ninth Circuit held that, because it was in grave doubt as to harmlessness of an error, it must conclude counsel's omission prejudiced Lord's defense. *Lord*, 184 F.3d at 1096. Lord argues the Ninth Circuit required Lord to meet too harsh a standard because it required Lord to show both a reasonable probability of prejudice and a lack of harmless error in order to obtain relief. In fact, the Ninth Circuit combined the two standards to alleviate Lord's burden of proof.

Lord first argues the Petitioner is "splitting hairs". Opposition to Petition for Writ of Certiorari, at 9-10. Lord asserts that the possibility the evidence could affect the verdict is the equivalent of a reasonable probability sufficient to undermine confidence in the outcome. However, "the mere possibility of a

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[3] Lord suggests there is no need to resolve the conflict created by the Ninth Circuit's opinion because this is a pre-AEDPA case. Because Ninth Circuit continues to apply its prior precedent in reviewing AEDPA cases, *see Duhaime v. Ducharme*, No. 98-36073 (9th Cir. January 10, 2000) (WESTLAW 2000 WL 12056), the Ninth Circuit will continue to apply the *Lord* decision in future cases.

different outcome is not sufficient to prevail on the prejudice prong." *Crane v. Johnson*, 178 F.3d 309, 312 (5th Cir.), *cert. denied*, 120 S. Ct. 369 (1999). Rather, there must be a reasonable probability of a different outcome. "[T]he question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Strickler v. Greene*, 119 S. Ct. 1936, 1952 (1999) (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). Because the teenagers' testimony would not have put the whole case in a different light, Lord fails to show prejudice.

Lord next mistakenly asserts that the Ninth Circuit required him to prove both prejudice and a lack of harmless error. In *O'Neal*, the Court considered the unusual circumstance where the "record review leaves the conscientious judge in grave doubt about the likely effect of an error on the jury's verdict." *O'Neal*, 513 U.S. at 435. The Court defined "grave doubt" to mean "that, in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *Id.* In such a situation, the judge should treat the error as if it were not harmless. *Id.* Thus, *O'Neal* concerned how, after the petitioner had proven an error exists, the court should review the error to determine if it affected the judgment. *O'Neal*, 513 U.S. at 436. The federal courts apply this standard to determine if an error is harmless, not to determine the preliminary question of whether an error in fact occurred.

By citing to *O'Neal*, the Ninth Circuit clearly indicated it was in "grave doubt" as to whether counsel's alleged deficiencies prejudiced Lord's defense. Because of this doubt, Lord obviously did not carry his burden of proof under the second prong of *Strickland*. Because the Ninth Circuit mistakenly applied the *O'Neal* standard in determining the second prong of *Strickland*, however, the court erroneously believed it must assume prejudice occurred. The court therefore relieved Lord of his burden of satisfying the prejudice prong of *Strickland*.

III. CONCLUSION

For the reasons stated herein and in the petition for a writ of certiorari, the petition should be granted.

RESPECTFULLY SUBMITTED

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